U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 02 November 2004

CASE NOS.: 2003-LHC-02850
2003-LHC-02851

OWCP NOS.: 01-154774
01-154775

In the Matter of

DAVID K. DYER
Claimant

v.

ATKINSON CONSTRUCTION
Employer

and

TRAVELERS INSURANCE COMPANY
Carrier

Appearances:

Janmarie Toker (McTeague, Higbee, Case, Cohen, Whitney & Toker), Topsham, Maine, for the Claimant

Richard van Antwerp (Robinson, Kreiger & McCallum), Portland, Maine for the Employer and Carrier

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

David K. Dyer (the "Claimant"), a construction worker, alleges that he suffered injuries to his back in November 2000 and June 2001 while working for Atkinson Construction ("Atkinson") at the Bath Iron Works Corporation ("BIW") shipyard in Bath, Maine. He filed

claims against Atkinson under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "LHWCA") seeking disability compensation and medical care. His claims were referred to the Office of Administrative Law Judges ("OALJ") for a hearing after informal proceedings before the District Director, Office of Workers' Compensation Programs ("OWCP") failed to produce a resolution.

A hearing was conducted before me in Portland, Maine on December 16, 2003, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing, represented by counsel, and appearances were made on behalf of Atkinson and its workers' compensation insurance carrier, The Travelers Insurance Company ("Travelers"). The Claimant testified at the hearing, and documentary evidence was admitted as Claimant's Exhibits ("CX") 1-19 and Employer Exhibits ("EX") 1-4. Hearing Transcript ("TR") 11-12, 71. Atkinson and Travelers (hereinafter collectively referred to as the "Respondents") objected to Claimant's Exhibit 20, a December 10, 2003 report from Dr. Phelps, on the grounds that the report was not served on opposing counsel pursuant to the requirements of the pre-hearing order and that good cause had not been shown for excusing the report's late submission. TR 9-11. This evidentiary issue was taken under advisement pending review of a letter which the Claimant's attorney sent to Dr. Phelps to generate the December 10, 2003 report, and the Claimant's attorney was granted leave to file a copy of her letter to Dr. Phelps post-hearing. TR 11, 74-75.

After the close of the hearing, the Claimant's attorney submitted a copy of her letter dated December 3, 2003 to Dr. Phelps which has been marked for identification as Administrative Law Judge Exhibit ("ALJX") 6. The Claimant's attorney also offered additional medical records by letters dated February 2, 2004, February 12, 2004 and March 4, 2004. The Respondents raised no objection to these additional records which have been admitted as CX 21-25. The parties were advised by order issued on April 1, 2004 that the record was closed, that the matter of the admissibility of CX 20 would be addressed in the decision on the merits of the claim and that the parties could file briefs by May 17, 2004. Thereafter, the briefing deadline was extended to August 1, 2004 at the parties' joint request, and briefs were received from the Claimant on August 2, 2004 and from the Respondents on August 10, 2004. Additionally, the Claimant moved by letter dated June 8, 2004 to admit prescription receipts as part of CX 25. Although this evidence was offered after the record had been closed, the Respondents have not objected and the late offer has been treated as a motion to reopen the record which is hereby allowed. Accordingly, the additional prescription receipts are admitted into evidence as part of CX 25.

After careful analysis of the evidence contained in the record and consideration of the parties' arguments, I find that the Claimant sustained injuries to his back which arose out of and in the course of his employment with Atkinson and that he is entitled to an award of nominal compensation, medical care and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties have offered the following stipulations: (1) the LHWCA applies to the claims; (2) there was an employer-employee relationship between the Atkinson and the Claimant

at all relevant times; (3) there was an "event" or "dramatic incident" on November 1, 2000 which, Atkinson contends, did not cause any disability; (4) the applicable average weekly wages for the two injury dates alleged in the claims are $934.49 for the November 1, 2000 injury and $938.86 for the June 2001 injury; (5) Atkinson and Travelers have not paid any benefits to the Claimant; and (6) an informal conference was held on the claims on October 10, 2002. TR 13-15. They also agree that the issues presented for adjudication are (1) whether the Claimant sustained an injury during June 2001 that arose out of and in the course of his employment with Atkinson, (2) whether the claim regarding the alleged June 2001 injury was timely filed, (3) whether the Claimant has suffered any disability as a result of either alleged injury, and (4) whether the Claimant is entitled to medical benefits for the alleged injuries. TR 14-15.

III. Admissibility of Claimant's Exhibit 20

CX 20 is a report dated December 10, 2003 from Robert N. Phelps, Jr., M.D. based upon an updated examination conducted on December 3, 2003. Dr. Phelps previously examined the Claimant at his attorney's request on August 26, 2002, and his findings and opinions were reported to the Claimant's attorney in a letter dated September 3, 2002. CX 14. The second evaluation on December 3, 2003 was also requested by the Claimant's attorney who asked Dr. Phelps in a letter dated December 3, 2003 to provide a "brief update" addressing the following questions: (1) his current diagnosis; (2) his current opinion as to "causality with respect to the events of October 31, 2000 and June 19, 2001"; (3) whether the Claimant's visit to an emergency room in August 2003, when he apparently experienced an acute onset of low back pain after playing horseshoes, was a result of his work-related injuries and sequelae; (4) whether Dr. Phelps continued to believe that the Claimant should avoid the type of work that he was doing at the time of the injuries; and (5) his comments regarding a medical report dated May 23, 2003 from John Pier, M.D. ALJX 6.[1] In his December 10, 2003 report to the Claimant's attorney, Dr. Phelps stated that the opinions expressed in his first report remained unchanged, and he offered his comments on the findings and opinions contained in the report from Dr. Pier. The Respondents objected to the admission of this second report from Dr. Phelps, asserting that Dr. Phelps is not a treating physician, that his report is essentially a response to the May 23, 2003 report from Dr. Pier, and that the Claimant had sufficient time to obtain the response from Dr. Phelps before the 30-day deadline for exchange of evidence established by the pre-hearing order (ALJX 3 at 2) because his attorney had been provided with the report from Dr. Pier in May or June 2003. TR 10.

As the Respondents correctly point out, Dr. Phelps is not a treating physician. Rather, he was retained by the Claimant's attorney to conduct an examination and provide his medical opinion on the Claimant's diagnosis and the cause, nature and extent of any disability. Indeed, the thrust of Dr. Phelps's December 10, 2003 report is his commentary on the findings and opinions contained in the May 23, 2003 report from Dr. Pier as well as Dr. Phelps's statement that his opinions had not changed. Since the Claimant does not dispute the Respondents' representation that Dr. Pier's report was disclosed to his attorney by not later than June 2003, it is clear that he had ample time in which to obtain a "brief update" from Dr. Phelps prior to the

[1] The report from Dr. Pier was introduced by the Respondents as EX 1.

expiration of the 30-day period established by the pre-hearing order for exchange of evidence. While the LHWCA regulations contain a requirement that an ALJ receive any "relevant and material" documents into evidence, 20 C.F.R. § 702.338; it is well-established that pre-hearing orders are a valid judicial tool to facilitate the conduct of a hearing and that it is within an ALJ's discretion to exclude evidence offered in violation of a pre-hearing order. *Williams v. Marine Terminals Corp.*, 14 BRBS 728, 732-733 (1981). Since good cause has not been shown for the Claimant's failure obtain the supplemental opinion from Dr. Phelps in sufficient time to comply with the pre-hearing order, the Respondents' objection to CX 20 is sustained, and the December 10, 2003 report from Dr. Phelps is excluded from evidence.

IV. Findings of Fact and Conclusions of Law

A. Background

The Claimant is a 53 year old resident of central Maine. TR 18-19. Since graduating from high school in 1970 and completing a three-year apprenticeship as a millwright/carpenter, he has worked for the past 33 years as a union millwright, carpenter and pile driver. TR 19-20. He began working for Atkinson as a pile driver in January 1999 on a construction project for the Bath Iron Works Corporation ("BIW"), a shipbuilder located on the Kennebec River in Bath, Maine. TR 21.

B. The November 1, 2000 Incident

On November 1, 2000, the Claimant was working for Atkinson aboard a barge at the BIW project on a project at the Bath Iron Works Corporation. TR 21. At the end of the shift, he slipped while attempting to descend a ladder from the barge to a small aluminum boat that was used to ferry workers between the barge and a dock and fell onto a piece of lumber from which he then slid about 12 or 14 feet to the bottom of the boat. TR 22. He testified that he felt pain on the right side from his mid-thigh to shoulder. TR 22. He told a co-worker and his foreman that he thought that he was all right and declined his foreman's suggestion that he fill out an accident report, stating that he wanted to go home and would fill out a report the following morning. TR 22-23. When he reported to work on November 2, 2000, the Claimant said that he could "hardly walk" and was "black and blue all over" so he went to Tom Harris, Atkinson's "safety guy" who refused to either fill out an accident report or authorize him to see a doctor. TR 23, 46. The Claimant said that he did not seek medical attention for his November 1, 2000 injury on his own even after Atkinson refused to provide him with medical treatment despite the fact that he "asked every day for six months." TR 28. Instead, he continued to regularly report to work for Atkinson, although he testified that he was given light duty by his foreman, a friend and fellow union member. TR 24-26.

As discussed above, the Respondents have stipulated that a "dramatic incident" occurred on November 1, 2000, and there is no evidence contradicting the Claimant's account that he fell while working for Atkinson and sustained harm to his body. Since the evidence thus establishes that the Claimant's fall occurred within the time and space boundaries of his employment, I find that he sustained an injury on November 1, 2000 which arose out of and in the course of his

employment with Atkinson. *See Durrah v. Washington Metropolitan Transit Authority*, 760 F.2d 322, 324 (D.C. Cir. 1985).

C. The Alleged June 9, 2001 Injury

In view of the Respondents position that no injury occurred on June 9, 2001, the Claimant is required to present a *prima facie* case by establishing (1) that he sustained a harm or pain, and (2) that an accident occurred in the course of employment, or that conditions existed at work, which could have caused the harm or pain. *Bath Iron Works v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999) (*Brown*), citing *Ramey v. Stevedoring Services of America,* 134 F.3d 954, 959 (9th Cir.1998) and *Susoeff v. San Francisco Stevedoring Co.,* 19 BRBS 149, 151 (1986). If he makes this *prima facie* showing, the Claimant invokes the presumption established by section 20 of the LHWCA that the claimed injury arose out of and in the course of his employment. *Brown* at 4.

The Claimant testified that by June 2001, his work for Atkinson on the barge had been completed, and he had been transferred to the "south crew" which was assigned to clear debris from the dock on June 9, 2001 in response to the Claimant's threats, which were made in his capacity as a union shop steward, "to call OSHA to shut the job down if they don't clean it up." TR 26-27. He accompanied the crew to the dock and while attempting to pick up a piece of steel tubing "felt something snap in my back, and I dropped to both knees." TR 27. This time, he said that he decided to be a little more assertive in attempting to get medical treatment:

> And I went to see the superintendent and asked him where the safety man was, I just hurt myself, and he said I don't know where the safety man is. If you're not able to go to work, go home, So I said, okay, I will but on the way home, I'm going to stop at Mr. McTeague's office first and I'm going to hire a lawyer. I've got enough. I've been eight months trying to get you guys to take me to the hospital for the one. By the time I got to the south yard where my car was parked, the safety guy picked me up and he took me to Bath Urgent Care which you have a report on.

TR 27. Records from the Mid Coast Hospital show that the Claimant arrived at the hospital's Urgent Care Center in Bath at 10:58 a.m. on June 9, 2001, accompanied by a "coworker." CX 16 at 128-129. He was seen by Michael Capriola, M.D. to whom he gave a history of intermittent low back pain over the past eight months following a 12 foot fall onto his right hip and an onset of similar pain that morning after he attempted to lift a piece of steel. *Id*. at 131. Dr. Capriola's diagnosis was low back pain of musculoskeletal origin, possibly related to prior trauma. *Id.* at 132. He released the Claimant to return to work on light duty with a lifting restriction of not more than 15 pounds. *Id.* at 133.

The Claimant testified that his low back pain and related symptoms worsened after the June 9, 2001 work incident in that he began to experience his "feet start jumping up and down with shooting pain." TR 29. Despite these worsening symptoms, he continued to work for Atkinson on light duty until the project was completed on September 28, 2001. TR 29-30. He was the last pile driver on the job and distributed the final paychecks to employees at the conclusion of the job. TR 48.

The record shows that the Claimant next sought treatment for his back on November 19, 2001 when he was seen at his doctor's office for a periodic evaluation of his diabetes. CX 17 at 135. During this examination, he reportedly complained on chronic back pain related to a fall while working, and he was referred for an MRI examination of his lower back. *Id.* at 136, 139. The Claimant testified that he thought that he had the MRI done on his own in November; TR 32; but the medical records show that when he was next seen by his family doctor on June 26, 2002 the MRI had not been done. CX 17 at 151. An MRI of the lumbar spine was conducted on July 8, 2002 and showed spondylotic changes involving the facets at multiple levels, most severely at L3-4 and L4-5, and mild lateral recess stenosis at L3-4 and L4-5. CX 17 at 153-154. Following the MRI, the Claimant was referred for a course of physical therapy. CX 18.

In August 2002, the Claimant's attorney referred him for an evaluation by Dr. Phelps. CX 14. Dr. Phelps examined the Claimant on August 26, 2002 and received a history from the Claimant that he initially hurt his back on "October 31, 2000" when he fell 12 feet into the bottom of a boat and reinjured the back on "June 19, 2001" when he attempted to move a piece of steel and felt something "snap" in his back. *Id.* at 111-112.[2] Based on his examination and review of the medical records, Dr. Phelps stated that his diagnosis was spondylotic changes at the facets of the lumbar spine and mild lateral recess stenosis at L3-4 and L4-5. *Id.* at 107. He further stated that "[i]t is more probable than not that David's back condition is causally related to either the work related injury of October of 2000 and the incident of June 19, 2001." *Id.*

At the Respondents' request, the Claimant was examined by John Pier, M.D. on May 23, 2003. EX 1. Dr. Pier received a history from the Claimant that is consistent with the history reported by Dr. Phelps. *Id.* at 2. Based on his examination and a review of the available medical records, Dr. Pier concluded that the Claimant suffers from "multilevel spondylitic changes [of the] lumbar spine with chronic intermittent low back pain . . . likely predominantly facet (joint) related." *Id.* at 5. Regarding causation, Dr. Pier stated that the Claimant suffers from a significant underlying degenerative changes in his lumbar spine which result in chronic intermittent low back pain. *Id.* at 6. He further stated that assuming the accuracy of the Claimant's history, "it is possible that he suffered a 'significant aggravation.'" *Id.* (internal quotation marks in original). In this regard, Dr. Pier added that the Claimant had given a consistent history to multiple providers and said that "it is very likely a fall of 12 feet would aggravate the symptoms of low back pain." *Id.* While Dr. Pier felt that the underlying degenerative condition is the Claimant's most significant problem, he stated that "medical visits, escalations of symptoms, some limitation in personal and work activities, and medical treatment/diagnostic workup, would be reasonably related to that date [November 1, 2000] of injury." *Id.* at 6. Dr. Pier did not specifically address the cause of the Claimant's June 9, 2001 onset of pain, although his report indicates that he reviewed the Bath Urgent Care Center records. *Id*. at 3.

[2] The Claimant also told Dr. Phelps that he had suffered a back injury in a motor vehicle accident several years ago, but all symptoms had resolved prior to the November 1, 2000 fall at work. CX 14 at 111-112.

On this record, I find that the Claimant has made out a *prima facie* case that he suffered a work-related injury on June 9, 2001. He testified that he suffered an onset of low back pain while attempting to lift a piece of steel debris at work, and his account of this incident is corroborated by the consistent history that he has given to the various physicians. His showing of an onset of pain and contributory working conditions is enough to invoke the statutory presumption of causation even though the medical evidence indicates that the Claimant may have been more vulnerable to suffering harm as a result of a pre-existing back condition. *See Bath Iron Works Corp. v. Director, OWCP*, 193 F.3d 27, 31 (1st Cir. 1999), citing *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982) ("Although a preexisting condition does not constitute an injury, aggravation of a preexisting condition does."). *See also Cairns v. Matson Terminals*, 21 BRBS 252, 256 (1988), citing *Whitmore v. AFIA Worldwide Insurance*, 837 F.2d 513, 516 (D.C. Cir. 1988) and *Wheatley v. Adler*, 407 F.2d 307, 311 (D.C. Cir. 1968).

Since the Claimant has invoked the presumption that he suffered a work-related injury, the burden shifts to the Respondents to produce substantial evidence which severs the presumed connection between the harm and employment or working conditions. *Bath Iron Works Corp. v. Director, OWCP,* 109 F.3d 53, 56 (1st Cir. 1997); *Sprague v. Director, OWCP*, 688 F.2d 862, 865-66 (1st Cir. 1982). Dr. Pier, the Respondents' expert, did not address the cause of the June 9, 2001 onset of low back pain, and the Respondents have offered no other evidence to rebut the presumption.

Accordingly, I conclude that the Claimant has met his burden of establishing that he suffered an injury to his lower back on June 9, 2001 that arose out of and in the course of his employment with Atkinson.

D. Was the claim based on the June 9, 2001 injury timely filed?

Section 13(a) of the Act bars a claim for compensation unless it is filed within one year of the injury or death or, in cases where there has been a voluntary payment of compensation, within one year after the date of the last payment. 33 U.S.C. § 913(a). Section 13(a) further provides that "the time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment." *Id.* Since it is presumed pursuant to section 20(b) of the Act that sufficient notice of a claim has been given, the burden is on the Respondents to demonstrate that the claim was filed more than one year after the date on which the Claimant became aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the June 9, 2001 injury and his employment. *See Horton v. General Dynamics Corp*., 20 BRBS 99, 102 (1987). The record shows that the claim based on the June 9, 2001 injury was filed with the OWCP on or about January 7, 2002. CX 3 at 7.[3] Even if one uses the earliest possible starting date of June 9, 2001, the claim was filed well within the section 13(a) one-year limitation period. Therefore, I find that the Respondents' untimely claim defense is without merit.

[3] The claim form incorrectly lists "June 19, 2001" as the date of injury. CX 3 at 7.

Given the fact that the *claim* was clearly filed within one year of the June 9, 2001 injury, it would seem that the Respondents intended to argue that the claim based on the June 9, 2001 injury is barred because of the Claimant's failure to give timely notice of the injury to Atkinson pursuant to section 12 of the LHWCA which provides that "[n]otice of an injury or death . . . shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment . . . [and] [s]uch notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person . . . on his behalf." 33 U.S.C. § 912(a)-(b). Although the Claimant's uncontradicted testimony establishes that he gave contemporaneous verbal notice of his injury to Atkinson on June 9, 2001 and was driven to the Bath Urgent Care Center by Atkinson's safety official on the BIW project, the evidence shows that he did not provide the written notice required by sections 12(a) and (b) until January 3, 2002. CX 1 at 2. However, his failure to provide the requisite written notice does not necessarily defeat the claim because section 12(d) of the LHWCA further provides that,

> Failure to give such notice shall not bar any claim under this Act (1) if the employer (or his agent or agents or other responsible officials or officials designated by the employer pursuant to subsection (c)) or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure on the ground that (i) notice, while not given to a responsible official designated by the employer pursuant to subsection (c) of this section, was given to an official of the employer or the employer's insurance carrier, and that the employer or carrier was not prejudiced due to the failure to provide notice to a responsible official designated by the employer pursuant to subsection (c), or (ii) for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death.

33 U.S.C. § 912(d). Since it is presumed pursuant to section 20(b) of the Act, in the absence of evidence to the contrary, that an employer has been given sufficient notice of an injury, the Respondents bear the burden of proving by substantial evidence that they have been unable to effectively investigate some aspect of the claim due to the Claimant's failure to provide adequate notice. *Steed v. Container Stevedoring Co*., 25 BRBS 210, 216 (1991) (affirming ALJ's finding that prejudice not shown where employer had seven months before the hearing to arrange for an independent medical exam and had access to medical records fully documenting the nature and extent of the claimant's injury). The evidence shows that Atkinson officials knew on June 9, 2001 that the Claimant alleged that he had injured his lower back while attempting to lift a piece of steel debris and had sought medical treatment, and the Respondents have made no showing, or even argued, that their ability to investigate the claim was in any manner compromised by the Claimant's failure to provide written notice of his injury meeting the requirements of section 12. Since the record shows that Atkinson had actual knowledge of the claimed back injury almost simultaneously with the injury's occurrence on June 9, 2001, I find that the Claimant's failure to

give written formal notice is excused. *Bath Iron Works v. Preston*, 380 F.3d 597, 607-608 (2004). Moreover, in the absence of any showing of prejudice, I conclude that the Claimant's failure to provide the Atkinson with the notice contemplated by section 12 does not bar his claim arising from the June 9, 2001 injury.

E. Has the Claimant suffered any disability as a result of his work-related injuries?

Drs. Phelps and Pier both agree that the Claimant has a full-time work capacity with some functional limitations due to his back condition. Dr. Phelps stated that he felt that the Claimant "should not be doing the type of carpentry work that he was doing at Atkinson due to his injuries." CX 14 at 107. As for specific limitations, he concluded that the Claimant could walk frequently (defined by Dr. Phelps as between one-third and two-thirds of an eight hour workday); sit, stand and drive occasionally (defined by Dr. Phelps as up to one-third of an eight hour workday); lift and carry up to ten pounds frequently, ten to fifty pounds occasionally, and never more than fifty pounds; and occasionally push/pull, climb/balance, stoop/squat, kneel/bend and reach over shoulder level. *Id.* at 124-125. Dr. Pier recommended that the Claimant's lifting be limited to 40 pounds and that he avoid frequent bending, twisting or working in awkward positions requiring back extension. EX 1 at 7. He added that the Claimant "may need more frequent times to stretch and pace his workday consistent with the underlying condition and his age." *Id.*

Subsequent to his lay off on September 28, 2001 at the conclusion of Atkinson's construction project at BIW, the Claimant has continued to obtain regular work through his union, but he testified that his back pain and limitations prevent him from performing many physical tasks and that he needs help from coworkers. TR 30-31, 34.[4] He also said that although he has been able to find work through the union, there have been job opportunities, such as work on the "Big Dig" construction project in Boston, which he has not been able to pursue because of his physical limitations. TR 31-32. Aside from the "Big Dig" job, the Claimant did not identify any other work that he has not been able to accept since September 2001, and he acknowledged on cross-examination that he never received a specific employment offer to work in Boston. Rather, he testified that a representative from a Boston local had visited the Atkinson worksite at BIW and told the Claimant that he should call if he wanted to come to

[4] The Claimant testified that he cannot lift 40 pounds, and he portrayed his physical condition since the injuries on the Atkinson job as deteriorating to the point where he is unable to engage in any significant physical activity and is dependent on the charity and good will of his coworkers and more recent employers. TR 35-36, 42. However, I do not credit the Claimant's testimony regarding the extent of his limitations because it is not supported by the medical findings and opinions from Drs. Phelps and Pier, and because of his tendency to embellish which is demonstrated by his claim that he passively accepted Atkinson's refusal to complete an accident report regarding the November 1, 2000 incident or to provide him with medical care for his injury despite his asking "every day for six months." TR 28. In my view, the Claimant's professed passivity is completely inconsistent with his willingness as the shop steward "to call OSHA to shut the job down" (TR 27) because debris had collected on the dock, and it is strongly suggestive of a propensity toward exaggeration which erodes the credibility of his testimony regarding the severity of his injuries and limitations.

Boston to work on the Big Dig. TR 60. However, he decided not to apply for a job on that project because he did not feel that he could pass a physical examination. TR 60-61.

With regard to his employment since leaving Atkinson, the Claimant testified that he went to work in October 2001 on a nuclear power plant job in Virginia, and he has continued to work for a series of different employers through his union. TR 49-50, 52-57. The Respondents introduced records from the Northern New England Carpenters Benefit Funds (EX 2) which the Claimant identified as containing accurate information concerning his earnings, hours worked and employers for the period of November 1, 1995 through July 23, 2003. TR 43-44. These records show that the Claimant worked the following hours: 215 hours in 1995; 1098 hours in 1996; 1933.5 hours in 1997; 1570.5 hours in 1998; 2018.5 hours in 1999 including 1984.5 hours for Atkinson; 2104.5 hours in 2000 including 2039.5 for Atkinson; 1916 hours in 2001 including 1550 for Atkinson; 1600 hours in 2002; and 1354 hours during the first nine months of 2003. EX 2 at 3-5. The Claimant testified that his employment pattern since leaving Atkinson's BIW project is consistent with his pre-Atkinson pattern in that he typically worked for multiple employers on jobs of short duration with intermittent periods on unemployment. TR 58. He also acknowledged that his steady employment between 1999 and 2001 with Atkinson was not typical of his work history. TR 58.

The Claimant asserts that a comparison of his pre- and post-injury earnings demonstrates that he has suffered a loss of earning capacity of approximately 25 percent for which he seeks disability compensation. His rationale is as follows:

> Mr. Dyer's average weekly wage was $934.49 (November 1, 2000) and $938.86 (June 2001). Using the latter figure, he had annualized earnings before his injury of $48,820.72 without any type of adjustment for inflation, etc. In the year 2001, Mr. Dyer was only able to earn $39,546. In the year 2002, his earnings were even less - $33,310. The records into evidence concerning 2003 indicate earnings of approximately $38,836.70. Adding all three together and dividing by three yields an average of $37,230.92 per year in post injury employment, average weekly wages of $715.97. Thus, when considering his actual earnings, Mr. Dyer has demonstrated approximately at 25% ongoing loss of earning capacity.

Claimant's Brief at 6. The Respondents concede that the Claimant earned less in 2001 and 2002 than he did in 2000, but it contends that the reduction in his wages had nothing to do with his injuries and everything to do with the normal economic cycles of construction work. Respondents' Brief at 3-4. Moreover, the Respondents assert, the Claimant's wage records show that he actually earned significantly more during 2003:

> The tax and income records for 2003 [EX 3] show income from employment of $41,805.54 through September of that year. If he worked only forty hours per week, the union benefit records [EX 2] would suggest that he worked a total of about 33.85 weeks through September 2003. His average weekly income from employment in 2003 would therefore be $1,235.02. If, of course, he worked more than forty hours per week, then the records would confirm that he would have

> worked fewer than about thirty-three or thirty-four weeks in 2003, and his average weekly income would be even higher than $1,235.02.

Respondents' Brief at 4. The Respondents thus argue that the claim for disability compensation should be denied because the Claimant has not suffered any loss of wage-earning capacity that is attributable to his injuries. Respondents' Brief at 8.

The LHWCA defines a disability as an "incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(2)(10) (italics supplied). Since the Claimant does not seek compensation for a loss of use of an enumerated body part under the LHWCA's schedule of losses, 33 U.S.C. § 908(c)(1)-(20), he must demonstrate a loss of earning capacity in order to establish entitlement to compensation based on the difference between his pre-injury average weekly wage and his post-injury earning capacity. *Barker v. U.S. Dept. of Labor*, 138 F.3d 431, 434 (1st Cir. 1998). *See also Bath Iron Works Corp. v. Director, OWCP*, 942 F.2d 811, 813 (1st Cir. 1991), *aff'd*, 506 U.S. 153 (1993); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 574-575 (1st Cir. 1978). We know what the Claimant earned prior to his injuries, and we know what he has earned since, so the first issue to be addressed is whether his actual post-injury wages reasonably and fairly represent his wage-earning capacity. *See Wood v. U.S. Dept. of Labor*, 112 F.3d 592, 595 (1st Cir. 1997). I conclude that they do and that the Claimant has not shown any compensable loss in wage-earning capacity that is attributable to the injuries he sustained during the course of his employment with Atkinson.

While the Claimant testified that he has had to forego some job opportunities due to his limitations, the Big Dig work was the only such opportunity identified, and the Claimant's testimony that a union business representative suggested that he call if he wanted to come down to Boston, in my view, falls well short of establishing the existence of a concrete offer of a job that the Claimant could have obtained but for his injury-related limitations. Thus, I find that the evidence is insufficient to establish that the Claimant has lost any opportunities to work due to his injuries since leaving Atkinson's employment. The Claimant also seems to contend that his post-injury wages are not fairly indicative of his true wage-earning capacity because he has been able to continue working only through the good will of co-workers and/or beneficence of his later employers. *See generally Devillier v. National Steel & Shipbuilding Co*., 10 BRBS 649, 658 (1979) (where injured worker is carried by co-workers, wages paid by beneficent employer must be discounted in determining whether worker suffered any compensable loss). Granted, the Claimant may need some assistance with physically demanding tasks such as carrying his 100 pound toolbox, but he has not presented any evidence satisfying the recognized indicia of sheltered or non-competitive employment. *Cf. Bath Iron Works Corp. v. White*, 584 F.2d 569, 575 (1st Cir. 1978) (transfer of injured worker to lower-paid position while maintaining his pre-injury wage rate); *Burch v. Superior Oil Co*., 15 BRBS 423, 427 (1983) (customizing job locations to meet a claimant's physical restrictions, hiring an extra person to help him with heavy work and paying him more than his co-workers; *Patterson v. Savannah Mach. & Shipyard*, 15 BRBS 38, 42 (1982) (treating injured worker with "kid gloves" and creating a special position that would not necessarily be filled if he left; *Lopes v. Georgia Ave. Tavern*, 13 BRBS 1125, 1128 (1981) (job obtained through family members); *Shoemaker v. Schiavone & Sons, Inc*., 11 BRBS 33, 37 (1979) (paying injured worker full-time wages for part-time work may). Indeed,

there is no evidence to support a finding that the Claimant's post-injury work is unnecessary or that he has been paid wages that are not commensurate with the work actually performed. Accordingly, I find that this record does not provide an adequate evidentiary basis for discounting the Claimant's actual post-injury wages on the ground that they were derived from sheltered or non-competitive employment.

Having determined that the Claimant's post-injury wages fairly and reasonably represent his wage-earning capacity, I will now turn to the question of whether he has suffered any compensable loss of wage-earning capacity. In this regard, the Claimant, as outlined above, argues that a comparison of his earnings before and after the injuries demonstrates a loss of approximately 25 percent. Atkinson does not dispute that the Claimant earned less in 2001 and 2002 than he did in 2000, but it points out that his earnings increased in 2003 over 2000 and asserts that the facts show that these year-to-year fluctuations are the product of economic factors and have nothing to do with the Claimant's injuries. Atkinson also correctly notes that the Benefits Review Board, in *LaFaille v. General Dynamics Corp*., 18 BRBS 88 (1986) which involved analogous facts, rejected the earning capacity loss analysis advocated by the Claimant:

> Finally, we state our disagreement with the dissenting opinion's approach of allowing a possible permanent partial award in this case based on a technical comparison of the 1977 average weekly wage with post-injury wages in claimant's current position. Even though it is conceivable that creative calculations pursuant to Sections 8(c)(21), 8(h) and 10(c) could result in a wage loss on paper, such a procedure is not appropriate in situations where the employee has maintained steady, productive employment and a rise in income. In this regard, we note claimant's wages of $21,469 in 1976, prior to his temporary total disability, and his post-injury wages of $24,879 in 1979.

18 BRBS at 93. In my view, the Board's rationale in *LaFaille* is applicable to the instant matter where the evidence shows that the Claimant has continued to earn wages in competitive employment on the same union scale as his pre-injury employment, and where his wages in 2003 show an increase over pre-injury levels. Moreover, there is, as discussed above, insufficient credible evidence that the Claimant has lost any opportunities to work since leaving Atkinson as a result of his injuries. Accordingly, I find that a preponderance of the evidence shows that he has not suffered any compensable loss of wage-earning capacity. *See Darcell v. FMC Corp*., 14 BRBS 294, 298 (1981).

F. Is the Claimant entitled to a nominal compensation award?

In cases where a claimant fails to prove any current diminution in wage-earning capacity attributable to a work-related injury, an award of nominal or *de minimis* compensation may nonetheless be appropriate under the LHWCA when the evidence shows that "there is a significant potential that the injury will cause diminished capacity under future conditions." *Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 138 (1997). The Claimant has not argued for entry of a nominal award, opting instead to place all of his litigation eggs in the reduced wage-earning capacity basket. However, the Respondents fully addressed the availability of nominal compensation relief in their post-hearing brief, so I find that the issue is properly before

me. The Respondents contend that the record in this case does not support a nominal award since the Claimant has continued to work steadily, earning regular wages on the same pre-injury union scale, and they cite the Board's decision in *Gilliam v. Newport News Shipbuilding and Dry Dock Co*, 35 BRBS 69 (2001) as authority for denying such relief in this case. I disagree. In *Gilliam*, the Board affirmed the ALJ's denial of nominal compensation as supported by substantial evidence, stating,

> In the instant case, the administrative law judge determined that claimant failed to demonstrate that there is a significant possibility that he will need surgery, and thus, a significant possibility that he will miss work or suffer a diminished wage-earning capacity in the future. In particular, the administrative law judge found that claimant's unreasoned, self-serving, hearsay testimony that Dr. Byrd had told him that he might need to have surgery, did not establish the requisite significant possibility of future economic harm as a result of his injury. In contrast, the administrative law judge found determinative the absence of any direct statement by Dr. Byrd attesting to the significant possibility of surgery in the future and the presence in the record of Dr. Byrd's written statement approving claimant's decision not to have surgery. As the administrative law judge's finding that the credible evidence of record does not support a finding that there is a significant possibility that claimant will sustain future economic harm as a result of his injury is rational, supported by substantial evidence and in accordance with law, it is affirmed.

35 BRBS at 71. In contrast to the record in *Gilliam*, there is more in this case than the Claimant's self-serving testimony. Drs. Phelps and Pier have both recommended significant work restrictions based on their analysis of the objective medical evidence bearing on the Claimant's back condition, and Dr. Phelps has stated, without contradiction by any other physician, that the Claimant should no longer attempt to do the type of heavy construction work that he was performing prior to his injuries. In my view, it is reasonable to infer from this objective medical evidence that there is at least a "significant possibility" that the Claimant will at some future time suffer a reduction in his wage-earning capacity. *See Barbera v. Director, OWCP*, 245 F.3d 282, 288 (3rd Cir. 2001). *Cf. Buckland v. Dept. of the Army, NAF*, 32 BRBS 99, 101 (1997) (*de minimis* award properly denied in light of affirmative evidence that injured worker had been provided with a light duty job of indefinite duration and that employer had no objection to continuation of light duty work). Accordingly, I will award the Claimant nominal permanent partial disability compensation.[5]

G. Is the Claimant entitled to medical benefits?

An employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the LHWCA for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp*., 21 BRBS

[5] There is no dispute that any disability is permanent as Drs. Phelps and Pier both found that the Claimant's back injury had reached a point of maximum medical improvement. *See Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979).

219, 222 (1988). The Respondents have not contested their liability for the Claimant's medical care. Accordingly, I find that Atkinson is liable for all reasonable and necessary medical care as required by the Claimant for treatment of her work-related back injuries.

H. Attorney's Fees

The Claimant is entitled to an award of attorney's fees under section 28 of the LHWCA based on his attorney's successful prosecution of his claim. *Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. § 702.132, and the Respondents will be granted 15 days from the filing of the fee petition to file any objection.

IV. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following compensation order is entered:

(1) The Travelers Insurance Company ("Travelers"), as the responsible carrier for Atkinson Construction, shall pay the Claimant David K. Dyer, nominal permanent partial disability compensation pursuant to 33 U.S.C. § 908(c)(21) and (h) in the amount of $1.00 per week, such compensation payments to commence immediately upon filing of this Order in the Office of the District Director, OWCP, and to continue thereafter until further order;

(2) Travelers shall, pursuant to 33 U.S.C. § 907, provide the Claimant with all reasonable and necessary medical care for his work-related back injuries of November 1, 2000 and June 9, 2001;

(3) The Claimant's attorney shall have 30 days from the date of this order in which to file an application for attorney's fees, and the Respondents shall have 15 days from the date of service of the application to file any objection; and

(4) All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts